

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





77-5023

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

IN RE GERALD C. BARTON, INDIVIDUALLY,  
AND D/B/A SHER-BAR LAND AND CATTLE CO.,  
AND D/B/A SHER-BAR LAND AND CATTLE,  
BANKRUPT

MRS. ALICE LATTER FANTO,  
PLAINTIFF/APPELLANT

V.

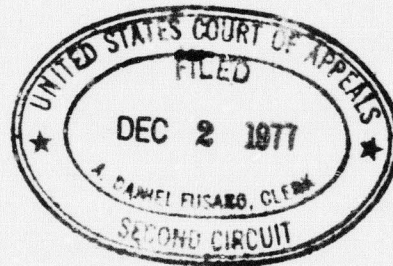
GERALD C. BARTON, ET AL

BANKRUPTCY NO 76B574

U.S COURT OF APPEALS  
(2nd Circuit) DOCKET NO.  
77-5023

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PLAINTIFF/APPELLANT'S BRIEF





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TABLE OF CASES AND AUTHORITIESTABLE OF AUTHORITIES

11 U.S.C. 32, 33 and 35.

Rules 409 and 906 of the Rules of Bankruptcy Procedure.

TABLE OF CASES

Gerber V. Fruchter 147 F2d 120 (2nd Cir., 1945)

In Re Davis 404 F2d 312 (2nd Cir., 1968)

In Re Jones 560 F2d 775 (7th Cir., 1977)

In Re Turner 185 FS 790 (D.C., N.C., 1960)

Lloyd V. Industrial Bank of Commerce 241 F2d 925 (2nd Cir., 1957)

O'Reiley V. Endicott Johnson Corp. 297 F2d 1 (8th Cir., 1961)

Seats V. Maryland Hotel Supply Co. 537 F2d 1146 (4th Cir., 1976)



STATEMENT OF THE ISSUES

1. Was the denial of Plaintiff's motion for an extension of time to file her Complaint to determine certain certain debts owed her by the Bankrupt nondischargeable under 11 U.S.C. 35.

2. To answer the above, the following sub-issues must be addressed:

2.1) Did Plaintiff make the requisite showing of cause to justify granting the extension of time to file her Complaint, under RBP 409(a)(2).

2.2) Did Plaintiff make the requisite showing of excusable neglect under RBP 906, to justify granting the extension.

3. Were certain findings of fact made by the lower Courts in support of their decision clearly erroneous and an abuse of discretion, on the basis that they were unsupported by the evidence before the Court.



STATEMENT OF THE CASE

On March 15, 1977, Plaintiff, Mrs. Fanto, moved in Bankruptcy Court, under RBP\*409(a)(2) and 906 for an extension of time to file a Complaint to determine the dischargeability of certain debts, approximating \$155,000 owed by the Defendants, Gerald C. Barton, Esq., Et Al, to Mrs. Fanto.

In support of the motion, the undersigned Attorney's Affirmation was submitted, alleging, in substantial detail, the personal injuries of a monetary nature, perpetrated on Mrs. Fanto. The Affirmation also detailed the irregularities in the Defendant's Bankruptcy Petition, which included, inter alia, failure to disclose required information, and material misstatements. The facts alleged were introduced to support a showing of "cause", under RBP 409 (a)(2) for the time extension, and to support a showing of "excusable neglect" under RBP 906.

As an additional basis for a showing of excusable neglect under RBP 906, as well as a basis for a showing of cause under RBP 409 (a)(2), the Affirmation alleged the failure of Plaintiff's former counsel to properly investigate the facts of this case, and then to timely file a Complaint based upon such facts.

On March 28, 1977, a hearing on the Motion was held before Bankruptcy Judge Schwartzberg, and in a decision dated March 29, 1977, the Hon. J. Schwartzberg denied the relief requested for a time extension. The basis given by the Bankruptcy Judge for denial was, one, no showing of excusable neglect under RBP 906 had been made; and two, no extension of time by Court Order was required, since fraud had been alleged, and on that basis, under Section 15 of the

\*Rules of Bankruptcy Procedure.



Bankruptcy Act (hereafter called the "Act"), 11 U.S.C.33, Plaintiff had an alternative remedy of moving to revoke the Bankrupt's discharge "at any time during the pendency" of the proceedings. Appeal of this decision was taken to the U.S. District Court for the following reasons. The Bankruptcy Judge completely failed to address himself to the applicability of RBP 409(a)(2), which is the specific statutory authority for time extensions relating to determinations of dischargeability. No reference was made to case law which, in the opinion of Plaintiff's Counsel, was controlling in this Circuit.

Plaintiff appealed on the additional basis that the Bankruptcy Judge's findings of fact upon which he based his decision that there was no "excusable neglect" under RBP 906 was clearly erroneous. Furthermore, to deny Plaintiff her requested relief on the basis that an alternative remedy may exist was clearly erroneous and an abuse of discretion.

On June 8, 1977 oral argument on the appeal was held before District Judge Charles L. Brieant, Jr. In the course of oral argument, Plaintiff's Counsel stated that RBP 409(a)(2) was the central statutory authority for the requested time extension, and also cited Gerber V. Fruchter 147 F2d 120 (2nd Cir., 1945), involving concealment of assets, as additional authority for the relief requested. The Hon. J. Brieant, Jr. stated from the bench that if the papers submitted to him evidenced concealment of assets, then by authority of the Gerber case alone, Plaintiff would obtain the requested relief. The District Judge then directed that Plaintiff's Counsel prepare a Supplemental Brief addressing itself to the issue of concealment of assets by the Bankrupt.



On June 15, 1977, Plaintiff's Supplemental Brief was submitted to the Court. In a letter dated June 22, 1977, Defendant's Counsel replied to Plaintiff's Supplemental Brief.

In an Affirmation dated July 6, 1977, Plaintiff's Counsel replied to Defendants' letter of June 22, 1977. The Affirmation noted, inter alia, admissions by Defendants' Counsel of the following:

1. Failure to disclose interest income on savings account deposits over the two years preceding bankruptcy. (It also appears that the amount of such deposits may be approximately \$100,000.00.)

2. Transfers of approximately \$97,883.00 by Mr. Barton to his wife within 1 year of filing Bankruptcy.

On July 18, 1977, the Hon. J. Brieant, Jr. denied Plaintiff's requested relief in its entirety, making numerous findings of fact unrelated to the evidence before the Court; disregarding in entirety the Supplemental Brief the Court itself had specifically requested; disregarding the Gerber case, and making no reference whatsoever to RBP 409(a)(2).

On July 27, 1977, Plaintiff moved for reargument, requesting, inter alia, that a Court Reporter be present to record the proceedings.

On August 2, 1977, Plaintiff's Motion was denied in its entirety, without opportunity for oral argument. On August 19, 1977, Plaintiff filed her Notice of Appeal to the Court of Appeals for the Second Circuit.

Finally, because the District <sup>Court</sup> ~~did not~~ have a Court Reporter on hand on the date of that hearing, and denied Plaintiff's motion for reargument which, inter alia, had requested the presence of a Court Reporter, this Court has no Transcript before it in which Plaintiff's



Counsel has orally addressed the Court on the applicability of RBP 409(a)(2). This is unfortunate, because the matter was addressed at length and in detail before the District Court. It was also specifically addressed in all the papers submitted to the Courts below, including Plaintiff's AFFIRMATION in support of the motion for a time extension dated March 15, 1977. Reference to the Transcript of the Hearing before the Bankruptcy Court, however, will show that Plaintiff's Counsel failed to focus the attention of the Court on RBP 409 at the oral argument. Appendix pp 29-41. The Transcript will show that the Court addressed its questions to RBP 906, at length, although the papers submitted to the Court argued that RBP 906 was only an alternative basis for relief, and RBP 409 was controlling. This failure to address the applicability of RBP 409 carried over into the opinion of the Bankruptcy Court. If the oral argument was the reason for this, which would be improper, no such reason could be used to explain the actions of the District Court in failing to address RBP 409 in its opinion, since the matter was argued at length at oral argument before that Court.



STATEMENT OF THE FACTS

The following facts were presented to the Courts below to support a showing of cause for a time extension under RBP 409(a) (2) and 906:

1. Detailed analysis of the transactions upon which Plaintiff alleged fraud, and basis for her claim of non-dischargeability, to wit, the debt of the Bankrupts to Plaintiff in the amount of approximately \$155,000.00. \*
2. Allegations of fraudulent sale of \$5,000.00 in worthless securities, at or about the time Plaintiff was fraudulently induced to invest the approximately \$155,000.00 in the cattle businesses of the Bankrupts.
3. Review and analysis of the Petition in Bankruptcy and supporting data, disclosed the following:
  - 3.1) The Bankrupts destroyed, mutilated, falsified, concealed or failed to keep or preserve books and records from which their financial conditions and business transactions might be ascertained.
  - 3.2) The Petition in Bankruptcy requires disclosure of all income other than from the operation of a business over a period of 2 years from the date of filing the Petition. The Bankrupts failed to answer this question. Elsewhere in the Petition it is disclosed that Mr. Barton had 7 savings accounts. Between March 31, 1975 and

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\* Specifically, the Bankrupts failed to disclose their poor financial condition to Mrs. Fanto at a time when they were inducing her to invest over \$150,000. Mr. Barton's status as her attorney was integral to this inducement. Additionally, the Bankrupts misrepresented the total amount required by contract to be invested.



March 4, 1976, Mr. Barton closed all of these accounts, leaving \$4512.00 therein. On its face therefore, Mr. Barton failed to disclose the interest income derived from such accounts.

Additionally, the Petition discloses that within 1 year of filing for Bankruptcy Mr. Barton transferred \$97,883.00 to his wife.

The clear inference is that the above amounts came from the savings accounts; thus, Mr. Barton failed to disclose interest income, it appears, on almost \$100,000.00.

3.3) Failure to disclose the nature and amount of property contained in depositaries, and the names and addresses of each person for whom the property was held.

3.4) Failure to disclose dividend income, and income from the sale of stock.

3.5) Failure to disclose the transfer of ownership interest in an apartment cooperative; which interest had been transferred to 2 different creditors, one of which was to Plaintiff.

3.6) Failure to disclose whether losses were received by the Bankrupts from fire, although Mr. Barton was sued in New York State Supreme Court, Nassau County, in an action for distribution of proceeds under a fire insurance policy.

3.7) Although Mr. Barton is the President of a Corporation, the sole proprietor of a cattle farm, owned a 50% interest in an apartment cooperative, invested substantially in oil partnerships, owned substantial shares of stock in a real estate development corporation in Jamaica, West Indies, he stated in his Petition that no withdrawals were made from any of these ventures, and the only withdrawals made were from his law practice.



4) In support of the claim of excusable neglect under RBP 906, <sup>also</sup> it was/stated that Mr. Walter Socolow, Plaintiff's previous attorney, failed to adequately investigate the facts, although a copy of the Bankruptcy Petition was sent by the Attorney for the Bankrupts to Mr. Socolow, who failed to timely file a Complaint in the Bankruptcy Court in order to preserve Mrs. Fanto's rights.



ARGUMENT

1. RULE 409 WAS AUTHORITY FOR THE EXTENSION OF TIME REQUESTED  
IN THIS CASE.

1.1) RBP 409(a)(1) gives Mrs. Fanto authority, as a creditor, the right to file a Complaint with the Court to obtain a "determination of the dischargeability of any debt." This provision also states that such a Complaint "may be filed at any time," subject to the limitations set forth in RBP 409(a)(2).

RBP 409(a)(2) states that the time for filing a Complaint to determine the dischargeability of any debt "pursuant to 11 U.S.C. 35(c)(2)," shall be set by Court Order. The Hon. J. Schwartzberg pursuant to this authority set May 10, 1976 as the last day for such filing. RBP 409(a)(2) then goes on to state when an extension of time may be obtained:

The Court may for cause, on its own initiative  
or on application of any party in interest,  
extend the time fixed by this paragraph.

Based upon the above sentence, On March 15, 1977 Plaintiff moved the Bankruptcy Court for an extension of time since, absent the time extension, she would be precluded from obtaining a determination of dischargeability for debts specified in 11 U.S.C. 35(a)(2) and (a)(4), relating, inter alia, to false representations to obtain money, conversion, and fraud or misappropriation while acting in a fiduciary capacity. The statute does not, as Defendant has argued, apply only to time extensions prior to expirations of time set by the Court Order. In Re Jones 560 F2d 775(7th Cir., 1977). In Jones a Complaint to determine the dischargeability of a debt was not timely filed. In fact, not even an application to extend



the time for determining dischargeability was submitted. Nonetheless, the Bankruptcy Court chose to hear the merits of the claim (relating to misappropriation by a fiduciary), and ruled the debt to be nondischargeable. On appeal to the District Court, the debtor alleged violation of 11 U.S.C. 32(b)(1) (relating to Court Ordered time limitations for filing Complaints), since the Complaint was not timely, and no extension of time had been granted under RBP 409. However, the Court of Appeals for the Seventh Circuit reversed the District Court, ruling that the decision by the Bankruptcy Court to hear the claim impliedly applied RBP409(a)(2) to grant an extension of time to determine the dischargeability of the debt. Thus, an extension of time was retroactively granted in this case.

Based upon the above, the failure of the Courts below to even address themselves in their decisions to the applicability of Rule 409 was clearly improper and an abuse of discretion, and for that reason this Court should reverse.

2. FAILURE OF THE LOWER COURTS TO APPLY THE FACTS PRESENTED IN SUPPORT OF A SHOWING OF CAUSE FOR AN EXTENSION OF TIME WAS CLEARLY ERRONEOUS AND AN ABUSE OF DISCRETION.

2.1) The facts before the Court disclosed evidence of fraud, and other violations of 11 U.S.C. 35(a)(2) and (a)(4). Additionally, the facts/<sup>evidenced</sup> failure to disclose material information, and misrepresentation, in the Bankruptcy Petition and supporting papers. On these facts it was therefore improper and basis for reversal of the decisions of the lower Courts to not even apply RBP 409 to such facts to determine whether cause was shown for an extension of time thereunder. Additionally, given such facts, failure to grant



the relief requested was of itself an abuse of discretion and clearly erroneous.

2.2) The following cases address themselves to the legal consequences of failure to disclose material information, or misrepresentation, in a Bankruptcy proceeding:

O'Reiley V. Endicott Johnson Corp. 297 F2d 1 (8th Cir., 1961). There, J. Blackmun ruled that the assertion of honest intent will not overcome natural inferences from admitted facts. The relevance is, as a matter of law, certain negative implications arise from Mr. Barton's failure to disclose his interest income.

In Re Turner 185 FS 790 (D.C., N.C., 1960). There the Bankrupt failed to include in his schedule of assets a one-third stock interest for which he paid \$100.00. The Court ruled the omission to be false and on that basis alone there was reasonable grounds for believing the omission was intentional.

In Re Davis 404 F2d 312 (2nd Cir., 1968). There, the Court ruled there was concealment of assets where the Bankrupt transferred his home without consideration to his wife, and failed to disclose his interest therein.

Lloyd V. Industrial Bank of Commerce 241 F2d 925 (2nd Cir., 1957).

There the Court ruled the Bankrupt acted with reckless indifference by making a false statement without examining the available sources of knowledge at hand.

Gerber V. Fruchter 147 F2d 120 (2nd Cir., 1945). There, on the basis of alleged fraud a discharge was vacated 4 years after it was granted; the Court also ruled that it had inherent power to correct its judgments where the Bankrupts fraud had been put in question.



3. THERE WAS BASIS FOR AN EXTENSION OF TIME UNDER RBP 906, SINCE ON THE FACTS SUBMITTED A SHOWING OF EXCUSABLE NEGLIGENCE WAS MADE.

3.1) The inaction of an attorney is basis for a showing of excusable neglect. In Seats V. Maryland Hotel Supply Co. 537 F2nd 1146(4th Cir., 1976), the Court ruled that the inaction of an attorney resulting in the expiration of time, was basis for a showing of excusable neglect.

3.2) in Gerber V. Fruchter ,supra, allegations of fraud were sufficient to vacate a discharge 4 years after it was granted.

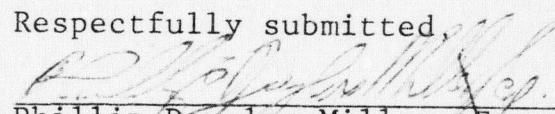
3.3) in In Re Jones, supra, the Court stated its general reluctance to penalize litigants for the "untimeliness of their counsel where the untimeliness was a product of a reasonable misapprehension.

SUMMARY

Based upon the allegations of fraud, misrepresentation, failure to disclose material information in the Bankruptcy Petition, and excusable neglect, and upon the authority of RBP 409, as well as RBP 906, and cited case law, the extension of time should have been granted, and on these facts failure to do so was clearly erroneous and an abuse of discretion, and the decisions of the lower Courts should accordingly be reversed, with costs.

Dated: December 2, 1977

Respectfully submitted,

  
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